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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B7

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 20 2009
WAC 07 227 51335

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate the lawful source of the invested funds. On appeal, counsel submits additional evidence. For the reasons discussed below, the petitioner has still not established the source of the funds transferred to the new commercial enterprise before the date of filing or that the funds transferred from the petitioner's father after the date of filing derive from lawful income.[1] Moreover, the claim on appeal that the petitioner is now in the process of investing the required funds is a material change from the original claim that the petitioner had purchased over $1 million in assets for the business on January 1, 2007 and the subsequent claim that the petitioner transferred over $1 million in cash in 2006 and 2007. That said, as will be explained below, the funds transferred prior to the date of filing were transferred to what appears to be the predecessor of the new commercial enterprise even after the new commercial enterprise had its own bank account. In addition, the record does not completely resolve the relationship between the new commercial enterprise and what appears to be its predecessor. This concern impacts on whether the petitioner made a *contribution* of capital.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

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[1] Our discussion of these issues will respond to counsel's assertion on appeal that these inquiries are not appropriate.

The petitioner indicated that the business is not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000.

According to Part 3 of the petition, the record indicates that the petition is based on an investment in a business, JT N Co, LLC, Federal Employer Identification Number (FEIN) [redacted], purportedly established on December 14, 2004. The record, however, reflects that the petitioner filed the company's articles of organization with the State of California on February 2, 2007. The petitioner submitted the final Internal Revenue Service (IRS) Form 2553, Election by a Small Business Corporation, to be treated as a Subchapter S corporation as of 2008. This form, Section H, reflects that JT N Co., LLC first had shareholders, first had assets or began doing business on April 1, 2007.

The record contains the 2006 IRS Form1065 U.S. Return of Partnership Income for JT and Company, LLC, EIN [redacted] The return reflects that this company was established on December 14, 2004. The company ended the year with inventory of $1,007,560, the amount of the petitioner's initial investment claimed on Parts 3 and 4 of the petition. Specifically, on Part 4 of the petition, the petitioner indicated that he had purchased $1,007,560 in assets for the new commercial enterprise. Schedule L of the IRS Form 1065, however, also reflects $692,636 in nonrecourse loans and only $444,844 in capital accounts. In response to the director's request for additional evidence, the petitioner submitted the initial 2007 IRS Form 1065 for JT N Co, LLC, FEIN [redacted] The 2007 Schedule L is blank for the beginning of the year. For the end of the year, JT N Co., LLC showed $1,193,670 in inventory, $231,847 in mortgages and $1,081,851 in capital accounts. The petitioner's schedule K-1 for 2007 reflects a capital contribution of $1,007,560 for the year and a $74,291 increase in equity due to the growth of the company.

The petitioner provides no explanation for dissolving JT and Company, LLC and continuing the same enterprise as JT N Co., LLC. Significantly, according to 8 C.F.R. § 204.6(e), "invest" means to "contribute" capital. The common meaning of "contribute" is "to give or supply." Webster's New College Dictionary 251 (3rd ed. 2008). None of the various definitions for "contribute" include a failure to remove funds. *Id.* In addition, the regulation at 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The examples of **evidence of an investment include the documentation of active contributions of capital.** The interpretation that an investment must involve an active contribution of new funds has been twice tested in federal court. *See generally Kenkhuis v. INS*, 2003 WL 22124059 (N.D. Tex. Mar. 7, 2003); *De Jong v. INS*, 1997 WL 33765206 (E.D. Tex. Jan. 17, 1997). We also note that *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm'r. 1998) provides that corporate earnings cannot be considered the earnings of the petitioner even if he is a shareholder of the corporation. Thus, it would appear that the petitioner may have dissolved JT and Company, LLC and reorganized (on paper) the underlying business as JT N Co., LLC in order to create the appearance of an active contribution of new assets from what was a passive reinvestment of proceeds. These issues must be taken into consideration as we review the evidence submitted to purportedly trace the invested funds from the petitioner to JT N Co., LLC.

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
>
> (i) Foreign business registration records;
>
> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
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> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm'r. 1998); *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The initial submission did not include any discussion of the source of the claimed $1,007,560 initial investment or the total claimed investment of $1,137,480 beyond the claim on part 4 of the petition that the investment included $1,007,560 in assets purchased for the business. As stated above, the petitioner submitted the 2006 final IRS Form 1065 filed for JT and Company, LLC showing ending inventory of $1,007,560. The petitioner also submitted the operating agreement for JT N Co., LLC indicating that the petitioner's investment would be $1,007,560. In addition, the petitioner submitted the March 2007 Wells Fargo Bank statement for JT and Company, LLC and the April 2007 Bank of

America statement for JT N Co., LLC. The March 2007 statement reflects $236,000 in "paypal" credits ordered by the petitioner.

On May 15, 2008, the director requested "documents to identify and trace all sources and origins of funds invested into the company" including but not limited to bank statements and wire transfers. In response, counsel asserts that the petitioner transferred $788,400 to "JT & Co" between August 2006 and April 2007 and an additional $227,100 in March 2007. This is a material change from the original claim on parts 3 and 4 of the petition that the petitioner made an initial investment of $1,007,560 on January 1, 2007 consisting of assets purchased for the business. Counsel further notes that "JT & Co. LLC's" 2007 tax return reflects a capital account of $1,081,851. As noted above, Schedule K-1 reflects a capital contribution that year of $1,007,560 with the remaining capital deriving from retained earnings. Counsel asserts for the first time that the petitioner obtained "the majority of the funds he invested" from his father in Indonesia as a gift.

The petitioner submitted his personal bank statement for Wells Fargo account number [redacted]. In January 2006, the account had an opening balance of $123,333.07. The January 2006 through July 2006 statements reflect deposits of $100,649.23. The only identified source for any of these deposits is an account belonging to the petitioner's sister for a May 11, 2006 deposit of $8,000 and a May 19, 2006 deposit of $10,000. The source of the remaining deposits is unknown. The statements reflect the following deposits into the petitioner's account and transfers to "Business Checking [redacted]," JT and Company, LLC's Wells Fargo account:

Date	Deposits	Transfers to [redacted]
8/2/06		$9,500
8/8/06	$9,500	
9/8/06		$20,000
9/11/06	$20,000	
10//4/06		$10,000
11/8/06		$50,000
11/16/06		$15,000
11/16/06		$5,000
11/17/06		$10,000
11/17/06		$9,500
11/21/06		$20,000
12/1/06	$51,000*	
12/6/06		$20,000
12/6/06	$50,000**	
12/12/06	$100,000**	
12/14/06		$25,000
12/20/06		**$150,000**
12/20/06	**$150,000****	
12/21/06	$9,500	
12/26/06		**$20,000**
12/26/06	**$20,000****	

12/29/06		**$50,000**
1/5/07	**$51,109**	
1/8/07		**$1,900**
1/8/07	**$2,000**	
1/23/07		$85,000
1/29/07	$100,000	
2/1/07	10,000**	
2/12/07	$150,000	
2/16/07	$10,166.60	
2/21/07		**$15,000**
2/21/07	**$15,000****	
2/23/07		$7,000
2/27/07	$120,000	
3/16/07		**$100,000**
3/16/07	**$110,000**	
3/22/07	$25,000	
3/27/07		**$150,000**
3/27/07	**$150,000**	
4/2/07	$130,000	
4/10/07	$50,000	
4/11/07		**$10,000**
4/11/07	**$10,000****	
4/12/07	$30,000	
4/13/07		$10,000***
4/24/07		$5,000***
4/24/07	$10,000	
4/24/07	$5,000**	

* Transferred from an account belonging to the petitioner's sister.
** Transferred from business checking account [redacted]
*** As of this date, JT N Co., LLC had opened its own account at Bank of America, yet the petitioner continued to transfer money to JT and Company, LLC's account.

As can be easily seen from the bold emphasis on the above chart, beginning on December 20, 2006, the petitioner deposited the exact amount as or a similar amount to the amount transferred to JT and Company, LLC on the same date as he "invested" those funds. Many of these funds come from account [redacted] **a business account. The record does not identify the account holder of** If it a business account belonging to JT and Company, LLC, the petitioner appears to be recovering the transferred funds or the transfer is merely a return of the funds. Even if account [redacted] does not belong to JT and Company, the above pattern is consistent with transferring funds from JT and Company through another business account to the petitioner either right before or right after the "investment" of those funds. Without bank statements for both JT and Company and account [redacted] covering August 2006 through April 2007, the petitioner cannot establish that all of the above transfers represent new funds that were not recovered by the petitioner.

We note that the petitioner did submit JT and Company's March 2007 statement. This statement reflects the following checks posted as cashed one business day after similar deposits in the petitioner's account: $100,000 on March 19, 2007 and $110,508 on March 28, 2009.

The March 2007 bank statement for JT and Company, LLC also shows $236,000 in paypal transfers ordered by the petitioner. Paypal allows individuals or businesses to send money through account balances, bank accounts or credits cards without revealing information about those accounts.[2] The record contains no evidence identifying the account from which these funds were drawn. The petitioner's personal bank account does not reflect withdrawals for these amounts. Thus, while the petitioner ordered these transfers, the record is still unclear as to whether the funds actually derive from the petitioner's personal funds. As noted above, it appears that the petitioner may own another business. Funds transferred from another business would not necessarily constitute a personal investment by the petitioner. *See Matter of Izummi,* 22 I&N Dec. at 195.

The director concluded that the petitioner had not demonstrated that the deposits in the petitioner's account derived from the petitioner's father and the petitioner had not submitted a gift letter from his father. Finally, the director concluded that the petitioner had not demonstrated that the petitioner's father had lawfully accumulated $1,000,000.

On appeal, counsel asserts that the director did not question the amount of the investment, merely the source. Thus, counsel asserts that the submission of evidence tracing one post-filing deposit back to the petitioner's father is sufficient as "representative of a 'pattern and practice' by which the petitioner's sister's solo account were part of a series of similar transfers which [the petitioner] made into the commercial enterprise between 2006 and 2007." Counsel further asserts that the petitioner continues to invest "in this manner, and he will be able to document the full required amount of $1 million within two years." As such, counsel appears to be amending the petitioner's original claim to have already invested at least $1,007,560 as of the date of filing. Finally, counsel asserts that bank letters attesting to balances in the father's accounts are sufficient evidence of the lawful source of the funds transferred to the petitioner. Counsel notes that cash is fungible, passing through numerous "channels." Counsel concludes that establishing that the funds are a gift ends the inquiry into the lawful source of those funds as to inquire further would establish an undue burden and create a never-ending inquiry that looks further and further back into the source of the funds. Counsel asserts that the State Department no longer inquires into whether aliens paid gift taxes on gifted funds and that this policy should "carry some weight" with U.S. Citizenship and Immigration Services. Counsel then concludes that the bank letters are the "highest and best" form of evidence available to show the lawful source of the father's funds.

Counsel is not persuasive. First, the petitioner must document the source of all deposited funds. In *Matter of Izummi,* 22 I&N Dec. at 195, the Commissioner found that funds deposited in an account with no evidence tracing the path of those funds could not be documented as deriving from a lawful source. Nothing in this decision suggests or implies that the petitioner need only document the source of a single deposit provided he claims that the remaining funds either derived from the same

[2] *See* https://www.paypal-media.com/aboutus.cfm (accessed April 16, 2009 and incorporated into the record of proceedings).

source or will be obtained from the same source. We note that even where an alien invests jointly with another investor, he must identify the source of all invested funds and demonstrate that all of the funds derive from a lawful source. 8 C.F.R. § 204.6(g). Thus, we will not presume from one documented transfer after the date of filing that all of the funds "invested" prior to the filing of the petition also derive from the same source. Moreover, as is clear from the discussion above, much of the invested funds actually derive from a checking account for an unknown business. Only $69,000 of the funds deposited in the petitioner's account prior to the date of filing traces back to the petitioner's sister's account, through which counsel asserts the petitioner's father transferred funds to the petitioner. The petitioner, however, transferred far more than that amount to JT and Company, LLC prior to the date of filing. The source of these additional funds is undocumented.

Moreover, the gift letter and bank letters are insufficient to establish the lawful source of the funds transferred from the petitioner's father. The bank letters do not explain how the petitioner's father lawfully accumulated $1,000,000. We reject counsel's assertion that a gift letter ends the inquiry. We concur that it is inappropriate to require an alien to trace the source of his funds back beyond the initial source. The petitioner must, however, establish that the original source is lawful. If the original source is a gift, the petitioner must establish that the individual gifting the funds obtained those funds through lawful income. While not alleged in this case, to hold otherwise would have the untenable result of allowing an alien to invest unlawful funds funneled through an individual who agrees to gift the funds back to the alien. Any policy at the U.S. Department of State regarding whether or not to review the source of funds at the immigrant visa stage is irrelevant as the consular officer only reviews these visas after USCIS has already adjudicated the Form I-526, including evaluating the source of the alien's funds. In light of the above, while the petitioner need not trace back the specific funds transferred by his father to their previous source, the petitioner must provide at least basic evidence that his father has lawful income or a legitimate business or investment interest that could account for the lawful accumulation of significant cash. We stress that our concern goes no further than the income of the petitioner's father and would not lead to a never-ending inquiry that reaches ever farther into the past.

We acknowledge that the record now establishes that the petitioner's father transferred $299,977.50 to the petitioner's sister on August 13, 2007 and that she then transferred $240,000 to the petitioner's account on the same date. The petitioner, however, filed the petition on July 27, 2007 and claimed to have already invested $1,007,560. While the initial evidence seemed to suggest that this investment was actually inventory carried over from the new commercial enterprise's predecessor, counsel asserted in response to the request for additional evidence that the "majority" of the investment claimed on the Form I-526 derived from the petitioner's father. The petitioner at that time submitted evidence of numerous cash transfers between August 2006 and April 2007. The petitioner now claims to only be in the process of investing the required funds.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175.

The claim that the petitioner is now only in the process of investing funds with no proven source before August 2007, which is after the filing date, is a material change from the previous claim that the petitioner transferred over $1,000,000 between August 2006 and April 2007 and the initial claims on the Form I-526 petition regarding the purchase of over $1,000,000 in assets for the company on January 1, 2007.

Finally, all of the funds transferred from the petitioner were transferred to JT and Company, LLC, which is not the new commercial enterprise. Some of these funds were transferred to JT and Company, LLC after JT N Co., LLC had its own account. Thus, the petitioner has not established that these funds were eventually made available to JT N Co., LLC, the new commercial enterprise identified on the Form I-526.

For the reasons stated above, merely growing a company and reinvesting the proceeds cannot be considered a qualifying investment. We see no practical difference in dissolving a company with retained earnings and continuing operations under a newly formed limited liability company. As is clear from the record in this case, such a maneuver on paper creates no new jobs, one of the main purposes of section 205(b)(5) of the Act.[3] Thus, the dissolution of JT and Company, LLC and the continued operation of the business under newly formed JT N Co., LLC is not a personal investment by the petitioner.

In summary, the transfer of inventory from a predecessor company to a paper successor is not a personal investment. While the record contains evidence of cash transfers prior to the date of filing, the petitioner has not established the source of these transfers, some of which may have either derived from the company itself or were returned to the petitioner on the same date. Moreover, these funds were not deposited with the new commercial enterprise identified on the petition. Finally, we will not consider funds transferred after the date of filing as these funds were not fully committed to the new commercial enterprise as of that date and represent a material change in the petitioner's initial investment claim. For all of the reasons discussed above, the petitioner has not demonstrated the lawful source of any personal funds invested prior to the date of filing.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[3] While the record documents the creation of only two full-time positions between the first quarter of 2007 and the first two weeks of May 2007, we will not raise employment creation concerns in this decision because the petitioner's business plan projects 30 employees by the third quarter of 2009.